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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 77

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE CONSOLIDATED GAS COMPANY OF NEW YORK,

Plaintiff in Error,

against

THE STATE BOARD OF TAX COMMISSIONERS,

Defendants in Error.

In Error to the Supreme Court of the State of New York.

POINTS FOR DEFENDANTS IN ERROR.

JULIUS M. MAYER,
Attorney General of the State of New York.

LOUIS MARSHALL,
Of Counsel.

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Points for Defendants in Error.

This cause was instituted in the Supreme Court of the State of New York by the relator, who prayed that a writ of certiorari might be allowed directed to the defendants in error, for the purpose of reviewing an assessment to the amount of $9,346,500, that being the valuation placed on the

special franchises belonging to the relator, such assessment having been made under the provisions of Chapter 712 of the Laws of 1899, which is known as the Special Franchise Tax Law. (Rec. pp. 3-10.)

The questions involved in this cause are substantially identical with those which have been considered in the Points submitted herewith in the case of *The People of the State of New York, ex rel, The Brooklyn City Railroad Company vs. The State Board of Tax Commissioners,* which is No. 79 on the present docket. It is, therefore, deemed desirable to avoid repetition, and in consequence the argument presented in that cause will be treated as having been repeated in the present case.

The differences between these two cases, which will be briefly adverted to, are indicated by the terms of the franchises of the relator, on which the assessment which is attacked in this cause has been based.

The issues herein were referred to Hon. Robert Earl, and were tried in conjunction with those arising in the Brooklyn City Railroad Company case. Independent findings of fact and of law were made by the referee. They appear at Record, pages 206-215.

The opinions rendered in this cause by the referee, the Appellate Division of the Third Department of the Supreme Court and the Court of Appeals are identically the same as those which were delivered in the Brooklyn City Railroad Company case. They appear at Record, pages 215-249; 288-311; 323-345.

The special franchises owned by the relator are set forth (Rec. pp. 164-187) and are as follows:

(1) The relator was formed by the consolidation of the following companies (Rec. pp. 181-187):

The New York Gas Light Company.
The Manhattan Gas Light Company.
The Metropolitan Gas Light Company.
The Municipal Gas Light Company.
The Knickerbocker Gas Light Company.
The Harlem Gas Light Company.

This consolidation was effected pursuant to the provisions of Chapter 367 of the Laws of 1884, entitled "An Act to authorize the consolidation of manufacturing corporations" passed May 28, 1884.

This statute authorized the boards of directors of two or more corporations organized under any general or special law of the State of New York for the purpose of carrying on any kind of manufacturing business of the same or of a similar nature, to enter into an agreement for consolidation, subject to the approval of the stockholders. It provides, that upon the approval of such agreement and the filing of a certified copy of the proceedings of the several corporations, the corporations so agreed to be consolidated "shall be merged into the new corporation provided for in the said agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein."

By Section 4 it is provided that such new corporation shall possess the general powers and be subject to the general liabilities and restrictions expressed in the third title of the eighteenth chapter of the first part of the Revised Statutes, and shall be entitled to enjoy the rights, franchises

and privileges possessed by each of the companies from which it has been formed, subject, however, to the liabilities, restrictions, duties and provisions expressed and contained in the act entitled "An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, and the acts amending or extending the same, so far as the same may be applicable to a corporation organized for the purposes expressed in the said agreement for consolidation and for which said new company shall have been organized.

Among the provisions of the third title of the eighteenth chapter of the first part of the Revised Statutes is Section 8, which provides:

"The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

Section 26 of Chapter 40 of the Laws of 1848, which is likewise referred to in the consolidation statute, reads as follows:

"Every corporation created under this act shall possess the general powers and privileges and be subject to the liabilities and restrictions contained in title third of chapter eighteen of the first part of the Revised Statutes."

Section 5 of the Act of 1884 confers upon the new company all the rights, privileges, franchises and interests of every kind belonging to or enjoyed by the several corporations so consolidated.

Section 6 preserves the rights of creditors.

The relator having derived its existence from an act consolidating several constituent compan-

ies into a new company, cannot, in the absence of a provision in its charter granting exemption from taxation, claim such exemption, even though the constituent companies had, under their several charters, secured such right of exemption.

In *Keokuk and Western Railroad Company* v. *Missouri*, 152 *U. S.*, 301, it was held that the consolidation of a Missouri corporation with an Iowa corporation operated to extinguish the old company and to form a new one as of the date of the consolidation, and that the provisions concerning exemption from taxation in the old charter did not pass to the new company. Mr. Justice Brown, addressing himself to this proposition, said:

"In the numerous cases which have arisen in this court as to the effect of a consolidation upon the existence and status of the constituent corporations, it has been held that the question of the dissolution of such corporations depended upon the language of the statute under which the consolidation took place—the presumption in each case being that each of the two lines of road will be held respectively to the privileges and burdens originally attaching thereto. Tomlinson *v.* Branch, 15 Wall. 460. If, upon the one hand, the identity of the prior corporations is preserved, an exemption from taxation, which one of them possessed, calls to that portion of the new corporation to which, under its former name, it had been attached. If, upon the other hand, the consolidation worked a dissolution of the prior corporations, their former privileges and franchises also ceased to exist. Thus, in the earliest of these cases, Philadelphia &c. Railroad *v.* Maryland, 10 How. 376, it was held that the Baltimore and Port Deposit Railroad Company, whose charter contained no exemption from taxation, did not acquire such exemption by consolidation with the Delaware and Maryland Railroad Company,

whose charter exempted the road from taxation, 'except upon that portion of the permanent and fixed works which might be in the State of Maryland.' A general rule was laid down in this case to which this court has steadily adhered, that the taxing power of the state should never be presumed to be relinquished, unless the intention to do so be declared in clear and unambiguous terms. This case was subsequently reaffirmed in the Delaware Railroad Tax, 18 Wall. 206."

To the same effect are:

Shields v. *Ohio, 95 U. S., 319.*
Railroad Company v. *Maine, 96 U. S., 499.*
Railroad Company v. *Georgia, 98 U. S., 359, 362.*
St. Louis, Iron Mountain, &c., Ry. v. *Berry, 113 U. S., 465.*
Chesapeake & Ohio Ry. v. *Miller, 114 U. S., 176.*
Yazoo & Mississippi Valley Ry. Co. v. *Adams, 180 U. S., 1.*
Shaw v. *City of Covington, 194 U. S., 593.*

(2) The several constituent corporations were organized under the following legislation:

(*a*) The New York Gas Light Company, by Chapter 85 of the Laws of 1823 (Rec., pp. 164-167).

The corporation was given "full power and authority to manufacture, make and sell gas, to be made of coal, oil, tar, peat, pitch, or turpentine, or other materials, and to be used for the purpose of lighting the said city or the streets thereof, and any buildings, manufactories, or houses therein

contained and situate; and to enter into, make and execute any contracts, agreements or covenants in relation to the objects of this incorporation, and of enforcing the same, and be capable of purchasing, taking and holding any estate or property, real or personal, as shall be necessary to give effect to the purposes of this incorporation, or for the accommodation of their business and concerns: Provided, the value of such real estate shall not exceed one hundred thousand dollars; And provided, also, that no public street, lane or highway in the City of New York, shall be dug into, or in any case injured or defaced, without the permission of the corporation of the said City first had and obtained."

The succeeding provisions of the act relate to the internal affairs of the corporation, the election of officers, the making of by-laws, the transfer of stock, the payment of subscriptions, the protection of its property from wilful injuries, and the withholding of banking powers.

Section XI provides:

"And be it further enacted, that the legislature may, at any future time or times hereafter, alter, modify, or repeal this act."

This corporation was reorganized on June 1, 1871, under the provisions of Chapter 37 of the Laws of 1848, as amended (Rec., p. 176). The provisions of this act are stated *infra*.

(*b*) The Manhattan Gas Light Company was organized under the Laws of 1830, Chapter 59 (Rec., pp. 168-170), "with full power and authority to manufacture, make and sell gas, to be made of coal, oil, tar, peat, pitch and turpentine, or

other materials, and to be used for the purpose of lighting the City of New York or the streets of New York, and any buildings, manufactories or houses therein contained and situate, and to lay pipes for the purpose of conducting the gas in any of the streets or avenues of the said city: And also, that the company will so conduct their manufactory or manufactories of gas, as not to create a nuisance; and that no public street, lane or highway, in the City of New York, shall be dug into, or in any way injured or defaced without the permission of the corporation of said City first had and obtained."

The succeeding provisions are similar to those contained in the Charter of the New York Gas Light Company.

Section 8 provides:

"In addition to the powers hereinbefore enumerated the corporation hereby created shall have and possess all of the powers and privileges and be subject to all the liabilities contained in title three of chapter eighteen of the first part of the Revised Statutes; and all the provisions thereof shall apply to this corporation."

By Chapter 543 of the Laws of 1855, the company was permitted to increase its capital stock to $2,000,000 by a resolution of its board of directors, and by Section 2 of that act (Rec., p. 172), was required to "supply to every inhabitant of the City of New York who shall request it and who shall pay for the same, such inflammable gas made by them as he or she may require, provided said gas is required where the mains or pipes of said company are now or may be hereafter laid, at a price not exceeding three dollars per thousand

cubic feet, for the period of one year after the adoption of the resolution named in the foregoing section, and after the expiration of that period, at a price not exceeding two dollars and fifty cents per thousand cubic feet."

This corporation was reorganized on December 31, 1867, under the provisions of Chapter 37 of the Laws of 1848, as amended.

(c) The Metropolitan Gas Light Company was organized under Chapter 545 of the Laws of 1855 (Rec., pp. 172-175) "with full power and authority at any time thereafter to manufacture, make and sell gas, to be made of coal, oil, tar, peat, pitch and turpentine, or other materials, and to be used for the purpose of lighting the City of New York and the streets, avenues, lanes, alleys and squares thereof, and any building, manufactories, or houses therein contained or situate, and to lay pipes for the purpose of conducting the gas in any of the streets, avenues, lanes, alleys and squares of the said city, and to adopt any other necessary means to furnish gas to any inhabitants of the city, and also that the said company will so conduct their manufactory or manufactories of gas as not to create a nuisance, and that no public street, avenue, lane, alley, square or highway in the said city shall be dug into or defaced or other means adopted in regard thereto for the purpose aforesaid without the permission of the two boards of the common council of said city first had and obtained, and the said boards are hereby authorized to grant and vest exclusive permission and authority to and in said company for said purposes to such extent and under such regulations as to them shall seem expedient, and such permission and authority shall be conclusive and

shall continue as thus fixed during the period designated by said boards at the time of granting the same."

The subsequent provisions of the statute are similar to those of the charters already considered.

(*d*) The Municipal Gas Light Company was organized on May 29, 1874 (Rec., pp. 178, 179), under the provisions of an act entitled "An act to authorize the formation of gas light companies", passed February 16, 1848, by filing in the office of the Secretary of State of New York and in the office of the Clerk of the County of New York a certificate in the form required by the statute.

This statute, which is Chapter 37 of the Laws of 1848, provides, by Section 18:

"Any corporation formed under this act shall have full power to manufacture and sell, and to furnish such quantities of gas as may be required in the city, town or village where the same shall be located, for lighting the streets, and public and private buildings, or for other purposes; and such corporation shall have power to lay conductors for conducting gas through the streets, lanes, alleys and squares, in such city, village or town, with the consent of the municipal authorities of said city, village or town, and under such reasonable regulations as they may prescribe; *and the said municipal authorities shall have power to exempt any corporation formed under the provisions of this act, from taxation on their personal property, for a period not exceeding three years from the organization of said corporation.*"

Section 16 of the act provides:

"The legislature may at any time alter, amend or repeal this acts, or may annul or repeal any incorporation formed or created under this act;

but such amendment or repeal shall not, nor shall the dissolution of any such company take away or impair any remedy given against such corporation, its stockholders or officers for any liability which shall have been previously incurred."

Section 23 of the act provides:

"Every corporation created under this act shall possess the general powers and priviliges, and be subject to the liabilities and restrictions contained in title third of chapter eighteen of the first part of the Revised Statutes."

(*e*) The Knickerbocker Gas Light Company was organized on July 10, 1876, under the provisions of Chapter 37 of the Laws of 1848. (Rec. pp. 179, 180.)

(*f*) The Harlem Gas Light Company was organized on February 2, 1855, pursuant to the same statute, by filing a certificate in the office of the Secretary of State and of the New York County Clerk.

It will be observed that these several franchises simply grant to the several beneficiaries named, the right to lay pipes in the city streets for the purpose of conducting gas. They are all of them subject to the reserved power of the legislature. In but a single statute is there any reference to the subject of taxation. That single exception is found in Section 18 of Chapter 37 of the Laws of 1848. Instead of providing for an exemption from taxation, it merely empowers the municipal authorities to grant exemption, not from general taxation, not from taxation of franchises, but from taxation on their personal property only, and even that power to exempt is limited to "a period not exceeding three years from the organization of" the corporation.

There is nothing to indicate that even that limited power was ever exercised by the municipality. Hence, there is no shadow of a foundation for even a pretense of exemption from the obligation to bear the burden of taxation which the State has the right to impose on all property within its jurisdiction.

The relator has thus obtained valuable franchises gratuitously, and because the State had seen fit, from motives of public policy, to impose no taxation on this property until the passage of the act of 1899, the liberality of the legislature is now sought to have imposed upon it the constitutional sanction of an irrepealable contract.

According to the contention of the relator, therefore, immunity from taxation can be secured to a corporation, if it can show that its franchises are a gift from the State, and that the State has, for a series of years, elected not to impose taxation upon them. In the last analysis, this must be the relator's process of reasoning.

This is rather extraordinary in view of the fact that the annual gross earnings of the relator, for the year 1899, were $7,350,685.68 (Rec. p. 212), while the tangible property used in connection with the franchises was of the character shown in the relator's report to the State Board of Tax Commissioners. (Rec. pp. 151-154.)

This same report shows (Rec. p. 157) that the value of tangible real property included in the "special franchises," on the basis of cost of production, was $4,908,088. The last assessment of real property of the relator, which was not used in connection with the "special franchises," was $9,426,800 (Rec., p. 158). And yet, from property thus valued at $14,325,000, these enormous earnings were derived.

If the case called for any further expression, it would be one of surprise at the moderation exhibited by the State, in dealing with the abuses which the Special Franchise Tax Law has sought to remedy.

It is respectfully submitted that the judgment under review should be affirmed.

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